FILE COPY

FILED
AUG 24 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-92

ABRAHAM COHEN and ESTHER FRIEDLANDER, Co-Executors of the Last Will of Raphael Cohen, Deceased,

Petitioners,

v.

FRANCHARD CORPORATION, LOUIS A. SIEGEL and SEYMOUR YOUNG,

Respondents,

and

JOSEPH E. LOW, GLICKMAN CORPORATION OF NEVADA and WEDGWOOD HOUSE ASSOCIATES,

Defendants.

PETITIONERS' REPLY BRIEF

EUGENE J. MORRIS
Attorney for Petitioners
40 West 57th Street
New York, New York
757-5050

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-92

ABRAHAM COHEN and ESTHER FRIEDLANDER, Co-Executors of the Last Will of Raphael Cohen, Deceased,

Petitioners,

v.

FRANCHARD CORPORATION, LOUIS A. SIEGEL and SEYMOUR YOUNG,

Respondents,

and

JOSEPH E. LOW, GLICKMAN CORPORATION OF NEVADA and WEDGWOOD HOUSE ASSOCIATES,

Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

Respondents attempt to defeat certiorari by (a) selective culling of the factual record below, (b) misstating the conflicting authorities and (c) avoiding the issue.

A. Respondents' factual showing as to their good faith, their lack of knowledge and the Glickman testimony of his wealth in 1960, only point up the substantial factual contest existing between the litigants. That controversy re-

quired that the jury be properly charged. The controversy, moreover, prevents respondents' claim that the verdict is supported by evidence. They should not say that the jury would have reached the same conclusion had there been a proper charge.

Respondents claim a good faith belief in Glickman's wealth. However, they made no similar claim or offered no similar proof for Venada (Glickman corporation of Nevada)—the actual lessee of the syndicated properties. Venada had, in fact, defaulted substantially in rent payments due, not only on other Franchard properties, but on the very leases being syndicated by Wedgwood House Associates. Venada had to borrow money from Franchard to pay some of its defaulted rent. Indeed, defendants had signed some of the checks for such "loans." It is conceded that respondents Siegel and Young did not investigate the Venada financial condition, nor whether Glickman was, in fact, wealthy as they believed.

Glickman's protestations of wealth were made post litem and are offset by the actual facts. He had borrowed substantial amounts via loans, had defaulted in payment of those loans and had pledged his vast stock holdings to secure the defaults. He was, in short, in extreme financial difficulty. Respondents had no right to rely upon the Glickman wealth, at least without investigation.

B. Respondents' argument rests, in part, upon Judge Adams' dissenting opinion in *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3rd Cir. 1972) *cert. den.* 409 U.S. 874 (1972).

Respondents apparently argue that there is no conflict in the Circuits since no liability was affixed to any party in any of the cited cases. Respondents misread the cases and, at best, raise a distinction without a difference.

The cases we cited in our petition make clear that several Circuits hold the view that scienter is not an element of

Section 10(b) of the Securities Exchange Act of 1934 and that negligence is sufficient to violate that section.

For example, in *Ellis* v. *Carter*, 291 F.2d 270 (1961) the Ninth Circuit rejected a defendant's argument that plaintiff "must allege and ultimately prove genuine fraud, as distinct from 'a mere misstatement or omission.'"

The Eighth Circuit has similarly clearly enunciated its understanding that mere negligence is sufficient to affix liability under Section 10(b). In *Myzel* v. *Fields*, 386 F.2d 718 (8th Cir. 1967) *cert. den.* 390 U.S. 951 (1968) (a case not cited in our petition), it held "[p]roof of 'scienter,' i.e. knowledge of the falseness of the impression produced by the statements or omissions made, is not required under Section 10(b)." The Court reiterated that holding in *City National Bank of Fort Smith, Arkansas* v. *Vanderboom*, 422 F.2d 221 (8th Cir.) *cert. den.* 399 U.S. 905 (1970). Moreover, in *Vanderboom* v. *Sexton*, 422 F.2d 1233 (8th Cir. 1970), the Court held that the state statute of limitations applicable to negligence, rather than common law fraud, was applicable to a Section 10(b) action.

It may also be noted that in at least one case where there was extensive discovery, the Court denied summary judgment even though there was sufficient evidence that scienter or intent to deceive was absent but a factual issue was present respecting negligence. See *Batchelor* v. *Legg & Co.*, 52 F.R.D. 545, 548-550 (D. Md. 1971), supplemented 52 F.R.D. 553 (1971).

The plethora of citations and their analysis in the various law review articles can be best stated to constitute the ebb and flow in a sea of confusion as to what requirements are needed for liability under Section 10(b). Indeed, the confusion has been described by Chief Judge Kaufman of the Second Circuit in *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276, 1291 (2nd Cir. 1969), *cert. den.* 397 U.S. 98 (1970), as "the great debate." We submit that the "great debate" needs resolution by this Court.

A further factor which militates in favor of review by this Court is that the legislative history is unclear as to congressional intent under Section 10(b).

This Court in *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963) construed the congressional history involving Section 10(b) by stating that Congress did not intend to codify common law fraud, rather it intended remedial and not technical considerations in the use of the word "fraud." This Court obviously meant that *scienter* was to be relaxed when it occurred in fiduciary cases, as in the case at bar.

Respondents also argue that the reliance question should not be considered by this Court because petitioners' counsel, at the trial court, acquiesced in the charge. That argument falls for two reasons.

In the first place, petitioners' trial counsel, in fact, offered contrary charges to the Judge who refused to submit them to the jury. Secondly, even if petitioners' counsel had acquiesced in the charge, the charge is still subject to review where it is based upon an erroneous statement of the applicable law. As we stated in our petition, the charge was in direct conflict with this Court's decisions. Where such conflict exists, the fact that there is acquiescence in the charge does not prevent review. Indeed, the Second Circuit reviewed the charge, thus, underscoring the reviewability of the charge. It declined to reverse because it found, *inter alia*, that the area had not been clearly defined by this Court—a view with which we disagree.

C. The issue is not that defendants should be held liable "upon a mere showing by a plaintiff that the defendant 'failed to detect certain material facts when he had no reason to suspect their existence.' " The issue is that respondents did not make any investigation as to the financial condition of Venada or Glickman and did not disclose that they had made no investigation. Instead, they allowed

the prospectus to represent that an investigation had been made. Under such circumstances, respondents cannot say or adopt a "see no evil, hear no evil" view of their fiduciary responsibilities.

CONCLUSION

For the reasons set forth in our petition and hereinabove, we respectfully submit that this case requires review by this Court.

Respectfully submitted,

EUGENE J. MORRIS
Attorney for Petitioners

IRVING BIZAR
BARBARA P. SUGARMAN
DEMOV, MORRIS, LEVIN & SHEIN
IRA JAY SANDS,
Of Counsel